No. 22,417

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

C & C PACKING COMPANY,
Respondent.

On Petition for Enforcement of an Order of
the National Labor Relations Board

RESPONDENT'S BRIEF

RAWLINS, ELLIS, BURRUS & KIEWIT

By _____
PETER KIEWIT, JR.

and

By _____
LAWRENCE L. PAVILACK

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RESPONDENT'S BRIEF

JURISDICTIONAL STATEMENT

Respondent concurs with the Statement of Jurisdiction as contained in the brief submitted by the National Labor Relations Board.

STATEMENT OF CASE

Respondent feels that the statement of the case made by Petitioner is insufficient. Respondent, therefore, presents the following statement:

There is no doubt that Respondent attended a meeting with the Union where Mr. Halloran counted some cards and compared the names on the cards with the names on a typewritten list. This meeting arose out of a petition to hold an election by the Union, which petition was subsequently withdrawn at the urging of the NLRB representative, Mr. Deeny, which led to the meeting with Mr. Halloran (Tr 200, 88). All witnesses concurred with this fact.

The meeting with Halloran was not a valid reliable card check for the purpose of determining the Union's majority, and

it was not agreed upon by the parties, nor was there ever a card check for the purpose of determining the Union's majority. It is the Union's interpretation that Halloran determined that 15 employees signed and designated the Union. Halloran testified that he conducted the card count because of a telephone call from Louis Ziman. (Tr. Page 9, line 6). Halloran had a typewritten list which he compared to the names on the cards, but he compared no signatures (Tr. Page 24, line 7). None of the cards were read by Halloran nor were the contents or the names on the cards read aloud by Halloran. (Tr. Page 24, line 15). It was never determined whether the names on the cards were written or printed because of Trial Examiner's erroneous ruling prohibiting such cross-

examination. (Tr. Page 30, line 21).

The General Counsel never established whether Halloran had even seen any of the signatures of the employees before the meeting. What occurred was that the Union withdrew its petition and arranged a meeting with Halloran, unbeknown to Respondent. At the meeting with Halloran, Halloran compared names on cards with names on a typewritten list. The names on the cards may have been written or typed. Neither the cards nor the names were read aloud. Halloran found that 15 names on the cards corresponded with 15 names on the list. Whether the list was complete or not was never established by General Counsel. There were probably one or two more employees, and possibly even more. Therefore the exact size of the bargaining unit was never established.

(Tr. Page 20, line 6; Trial Examiner's Decision, Footnote 2). The unit may have been as large as 30 employees, although the record does indicate that the unit probably consisted of 24 employees.

Prior to the meeting with Halloran, a meeting had been arranged for April 19, 1966. When this meeting was arranged is a disputed fact, and not an undisputed fact as stated in Trial Examiner's Decision. (Tr. Page 214, line 19; Page 228, line 4). A letter confirming the meeting went out in the usual course of office operations on the 14th. (Petitioner's Exhibit 18).

After the meeting with Halloran, Respondent's counsel informed R. David Crockett of the results, and Mr. Crockett emphatically stated that this was impossible.

Mr. Crockett testified that he had reason to doubt the Union's majority, in answer to a question from the Trial Examiner. (Tr. Page 290, lines 20 and 25).

Mr. Crockett was unable to testify to the reasons for his doubt. It is his state of mind which controls, and Trial Examiner committed error in disallowing testimony as to his state of mind. (Tr. Page 289, line 14).

Mr. Crockett would have testified as to his reason for disbelieving the Union represented 15 employees. To understand why Respondent in good faith did not believe the Union represented 15 men, it is necessary to determine the composition of the unit. First, the number of employees in the unit was never established by substantial evidence. At least seven of the employees could understand

Spanish, but not English. (See rejected exhibits 2 through 17). This means that the employees understood little or no English. Further, the testimony of Leyva, Alvarado, Nunez and Sanchez shows that they had very little formal education. If the Trial Examiner did not erroneously limit the amount of examination, Respondent would have shown that the said employees did not know what they were signing.

So what we had was a group of employees, with little formal education, a number of whom could not speak English. (See Rejected Exhibits 2 through 17).

The knowledge of this fact, plus other information received by the Respondent's President, M. L. Crockett, and its Secretary-Treasurer, R. David Crockett, caused them to believe in good faith that the Union could not

possibly represent 15 employees. The above facts would have been introduced had not the Trial Examiner erroneously determined that any such objections were waived because of the so-called card check. (Tr. Page 114, lines 1 through 9; Page 115, line 5; Page 133, line 22; Page 134, line 1).

The testimony of Leyva, Nunez and Sanchez indicated that the purpose of signing cards was to vote, and not to designate the Union. Thus, if their cards are disallowed, the Union had only 12 cards at the most out of 24 employees. If Respondent could have properly examined Walker, his questionnaire could have been used to refresh his memory, wherein he stated that he signed the card only to obtain an election. Alvarado, in his questionnaire, couldn't even understand the contents of the card. Therefore, the Trial Examiner should have allowed the use of their questionnaires for the purpose of

refreshing their memory, or for the impeachment of their testimony as a result of Respondent being surprised by said testimony, and for the impeachment of the testimonies of Mr. Allen and Mr. Benninger.

SPECIFICATIONS OF ERRORS

1. THE TRIAL EXAMINER ERRED IN RULING THAT NO TESTIMONY WOULD BE PERMITTED ATTACKING THE VALIDITY OF THE UNION AUTHORIZATION CARDS UNLESS SUCH TESTIMONY WAS LIMITED TO THE FOLLOWING AREAS:

A. WHETHER THE EMPLOYEE WAS TOLD THAT THE CARDS WOULD BE USED ONLY TO HAVE AN ELECTION.

B. WHETHER THE SIGNATURE ON THE CARD WAS THE GENUINE SIGNATURE OF THE EMPLOYEE PURPORTING TO HAVE SIGNED THE CARD (TR. 116, 117, 133, 151, 152, 167, 172, 173, 175, 176, 179, 186).

2. THE RECORD TAKEN AS A WHOLE DOES NOT BY SUBSTANTIAL EVIDENCE SUPPORT THE BOARD'S FINDINGS THAT THE MEETING WITH MR. WILLIAM HALLORAN WAS A VALID CARD CHECK FOR THE PURPOSE OF RECOGNIZING THE UNION NOR THAT THE METHOD USED WAS A RELIABLE METHOD OF RE-

COGNIZING A UNION, SUFFICIENT TO REPLACE A SECRET BALLOT ELECTION AS PROVIDED IN SECTION 9(C) OF THE NATIONAL LABOR RELATIONS ACT.

3. THE TRIAL EXAMINER ERRED IN LIMITING THE CROSS EXAMINATION OF MR. BENNINGER THEREBY PREVENTING RESPONDENT FROM ASCERTAINING THE VALIDITY OR INVALIDITY OF THE UNION AUTHORIZATION CARDS (TR. 133).

4. THE TRIAL EXAMINER ERRED BY STRIKING, AS IMMATERIAL, THE ANSWER OF MR. HALLORAN TO THE FOLLOWING QUESTION: "HAD YOU AT ANY TIME PRIOR TO LOOKING AT THE SIGNATURES ON THE CARDS TO THE BEST OF YOUR KNOWLEDGE SEEN THE SIGNATURES OF ANY OF THOSE INDIVIDUALS?" (TR. 30).

5. THE TRIAL EXAMINER ERRED IN DENYING RESPONDENT THE RIGHT TO USE

QUESTIONNAIRES OF THE EMPLOYEES FOR PURPOSES OF IMPEACHING THE AUTHORIZATION CARDS ADMITTED INTO EVIDENCE AND FURTHER ERRED IN DENYING RESPONDENT THE RIGHT TO USE THE QUESTIONNAIRES TO REFRESH THE MEMORY OF WITNESSES, ALL OF WHOM WERE EMPLOYEES OF RESPONDENT (REJECTED EXHIBITS 2 THROUGH 16; TR. 151, 152, 166).

6. THE TRIAL EXAMINER ERRED IN STRIKING THE TESTIMONY OF MR. ALVARADO, WHOSE TESTIMONY WAS MATERIAL AND HIGHLY IMPORTANT TO RESPONDENT'S PROOF OF THE INVALIDITY OF THE UNION AUTHORIZATION CARDS (TR. 176).

7. THE TRIAL EXAMINER ERRED IN RULING THAT RESPONDENT COULD NOT ASK OF THE WITNESS MR. LEYVA IF THE UNION CARD WAS READ TO HIM (TR. 173).

8. THE TRIAL EXAMINER ERRED IN FINDING AS A FACT THAT THE EMPLOYEES KNEW FULL WELL THE MEANING OF THE AU-

THORIZATION CARDS THEY SIGNED (TRIAL EXAMINER'S DECISION PAGE 5).

9. THE NLRB FAILED TO PROVE BY SUBSTANTIAL EVIDENCE THAT RESPONDENT DID NOT HAVE A GOOD FAITH DOUBT OF THE UNION'S MAJORITY.

10. THE TRIAL EXAMINER'S STATEMENTS AND ACTIONS DURING THE HEARING CONVEYED THE APPEARANCE OF A PARTISAN TRIBUNAL ALL TO THE DETRIMENT AND PREJUDICE OF RESPONDENT.

ARGUMENT

SPECIFICATION OF ERROR # 1

THE TRIAL EXAMINER ERRED IN RULING THAT NO TESTIMONY WOULD BE PERMITTED ATTACKING THE VALIDITY OF THE UNION AUTHORIZATION CARDS UNLESS SUCH TESTIMONY WAS LIMITED TO THE FOLLOWING AREAS:

A. WHETHER THE EMPLOYEE WAS TOLD THAT THE CARD WOULD BE USED ONLY TO HAVE AN ELECTION.

B. WHETHER THE SIGNATURE ON THE CARD WAS THE GENUINE SIGNATURE OF THE EMPLOYEE PURPORTING TO HAVE SIGNED THE CARD (TR 116, 117, 133, 151, 152, 167, 172, 173, 175, 176, 179, 186).

It is fundamental that an employer cannot lawfully recognize a Union or be guilty of refusing to bargain unless and until the Union's majority is proved by a reasonable method. Robeson Cutlery Co.

(1946) 67NLRB481.

Respondent respectfully urges that the Trial Examiner committed reversible error throughout the hearing in making rulings severely limiting and, in fact, making it impossible for Respondent to examine witnesses with respect to the following areas:

A. Whether the signature was obtained through duress or coercion or was obtained voluntarily.

B. Whether the employee could read or understand English.

C. Whether the employee knew what he was signing.

D. Whether card was read to the employee prior to his signing it.

E. Determination of the statements and representations made to the employees by the Union Solicitors.

F. Whether, in fact, the card actually represented the true intent of the party signing it.

This line of questioning is of upmost significance. The statements made by Union representatives to uneducated, Mexican-Americans who cannot read, write, speak nor understand the English language is important. As recently as March, 1968, the court in NLRB v. Shelby Mfg. Co., (3-7-68) stated about authorization cards.

> "They were calculated to and did indicate a purpose to secure an election. This is all the more clear from evidence that the card solicitors did, in fact, represent to a number of employees that their purpose was to secure an election."

Accordingly, the cards can't be used to support the bargaining order, concluded the Court.

In NLRB v. Dan Howard Mfg. Co., (1-12-68) the court stated it must determine the style or actual words a union agent used when soliciting cards. The cards will be rejected, the court said, if in their total context they made the employee believe their purpose was to get an NLRB election.

In the case at bar the Trial Examiner refused to receive any testimony concerning the circumstances surrounding the signing of the cards.

See also NLRB v. S. E. Nichols Co., (USCA-2 6-21-67). Engineers and Fabricators, Inc. v. NLRB (5th Cir. 4-12-67). Bauer Welding & Metal Fabricators, Inc. v. NLRB (8th Cir. 1966) 358 F. (2d) 766. NLRB v. Swan Super Cleaners, Inc. (10-25-67.)

These cases support the position that the cards are invalid as a substi-

tute for an election if the employees are led to believe the Union would represent them only after winning an election, even though they are also told the cards might be shown to the employer.

The Trial Examiner ruled on a number of occasions during the hearing that he would permit no testimony unless it was limited to two questions, namely;

1. Whether the employee was told that the card was to be used only for the purpose of having an election.

2. Whether the signature was the actual signature of the employee.

(Tr. 116, 117, 133, 151, 152, 167, 172, 173, 175, 176, 179, 186).

Clearly these rulings by the Trial Examiner were erroneous and resulted in the hearing being conducted without Respondent having the proper opportunity

to determine the validity or invalidity of the signature cards.

In John P. Serpa, 155 NLRB NO. 12, the Court said:

> "When General Counsel seeks to establish a violation of Section 8 (a)(5) on the basis of a card showing, he has the burden of proving not only that a majority of the employees in an appropriate unit signed cards designating the Union as bargaining representative, but also that employer in bad faith declined to recognize and bargain wit the Union."
>
> (Emphasis supplied)

In NLRB v. Kohler, 328 F2d 770 (7th Cir. 1964) the Court said the employer's good faith was irrelevant once the Union's majority was not established.

There were fifteen (15) authorization cards allegedly signed by Respondent's employees introduced into evidence. (Petitioner's Exhibits 3 - 17).

The evidence is unclear as to the number of employees in the bargaining unit, as this was never established by General Counsel. The uncontradicted evidence does establish that the unit contained somewhat more than twenty-two (22) men. Mr. Halloran did say that the list he had showed twenty-two (22) names. Therefore, the minimum number of employees in the bargaining unit would have to be at least twenty-two (22), and it may have contained more employees. This fact was never established. (See Footnote 2 of Trial Examiner's Decision).

Respondent attempted to disqualify some of these cards by direct testimony and by introducing questionnaires taken of Respondent's employees for the purpose of showing that employees signed only for the purpose of holding an election, and to show that several employees didn't know what

they were signing, in order to contradict and impeach the testimony of Allen and Benninger. Trial Examiner improperly refused the admission of this evidence, to which exceptions were made. The use of these questionnaires was not even permitted by the Trial Examiner for the purpose of refreshing the recollection of the employees who signed them (Tr. Page 151, line 24 through Page 152, line 1; Page 166, line 15).

Respondent introduced the testimony of Mr. Conception H. Alvarado, Mr. Andres M. Leyva, Mr. Narcisco G. Nunez and Mr. Magdaleno M. Sanchez and Mr. David Walker for the purpose of disqualifying the cards they allegedly signed. Because of the limited examination allowed Respondent's attorney, to which exceptions were made, Respondent was unable to inquire fully into the

validity of the cards, the circumstances surrounding their signing, and the intent of the parties signing (Tr. 116, 117, 133, 151, 152, 167, 172, 173, 175, 176, 179, 186)

The questionnaires (Respondent's Exhibits 1 through 16 in the Rejected Exhibit File) of the employees who testified clearly establishes that the answer contained therein weighed with their testimony, would establish that because of the language and educational barriers, their authorization cards should on the basis of the supporting evidence offered, be disqualified. Their testimony alone would indicate beyond a doubt that they had little or no conception of what they were signing. These employees who do not know the English lanugage need special protection. FIBRE Leather Mfg. Corp. 167NLRB No. 51.

Mr. Allen and Mr. Benninger testified that a Mr. Pete Garcia, who allegedly

spoke Spanish, accompanied them when they obtained the signatures from the Spanish speaking employees, but Mr. Garcia was never produced as a witness by the General Counsel and Respondent, by the Trial Examiner's ruling was prevented from eliciting testimony concerning Mr. Garcia from the employees themselves (Tr. 172). Therefore, it was never established by substantial evidence that the meaning and import of the cards was carefully and correctly read and explained to the Spanish speaking employees in a language they understood, as Mr. Garcia spoke Spanish, and not Mr. Allen or Mr. Benninger (Tr. 83, 141), and there is no way of knowing what the Spanish speaking employees told Mr. Garcia. Anything related to Mr. Allen or Mr. Benninger by Mr. Garcia as to what the Spanish speaking employees said is

pure hearsay. This in itself should disqualify the cards of the Spanish speaking employees, because the cards they signed may not reflect their real intention, since the cards were in English. See Norlee Togs, Inc., 129 NLRB 14 (1960), where the Board found a good faith doubt on employer's part when non-English speaking employees did not intend signing cards to authorize the Union to represent them. Respondent in the case at bar was even denied, by an erroneous ruling of the Trial Examiner, from asking the employees if Mr. Garcia was actually present when the cards were signed or whether the cards were read to them (T 173, 174). Thus Respondent was prohibited from introducing impeachment testimony to refute the statements made by Mr. Allen and Mr. Benninger. Since the cards were admittedly written in

English, and a number of the employees could neither read nor understand English, the rulings of the Trial Examiner prevented witnesses from stating whether the cards were read to them or whether they had any idea of what they were signing appears to violate a basic concept of evidence as established by our courts and offers no protection to these uneducated Americans of Mexican ancestry from possible acts of unscrupulous labor leaders.

The record of the hearing clearly proves by unimpeached testimony that when Mr. Benninger makes an unequivical statement there is good reason to seriously doubt its accuracy. When questioned about Mr. Sanchez (Tr. 109) Mr. Benninger stated that Mr. Sanchez speaks English well and understands English well. Then during the brief examination of Mr.

Sanchez allowed by the Trial Examiner (Tr. 185) the Trial Examiner himself asked the following elementary question:

> "If I understood you correctly, you do or do not understand English."

The witness made no response until the question was repeated in Spanish by the interpreter. Contrary to Mr. Benninger's firm statement, this uneducated employee was not even able to understand a most elementary question asked in English. Respondent should have the opportunity to fully explore the events and conversations occurring at the time the cards were allegedly signed.

There were seven questionnaires submitted, but not admitted into evidence, which were filled out in Spanish. These questionnaires would have established the inability of the employees to speak or

understand English and their very limited formal education. Four of the employees who testified - Conception H. Alvarado, Andres M. Leyva, Narcisco G. Nunez and Magadaleno M. Sanchez, could not speak or understand English, and an interpreter had to be used. There is grave doubt that these four witnesses had any understanding of what they had signed.

The witnesses testified as follows:

Conception H. Alvarado: Mr. Alvarado, in his questionnaire which was introduced, but not admitted into evidence, which he signed, states that he did not understand the language of Question No. 9, which was printed in English as follows:

> "9. Do you understand the following? 'I hereby authorize the AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, to represent me and

> bargain collectively with my employer in my behalf, to negotiate and conclude all agreements concerning wages, hours, and all other conditions of employment.
>
> 'I hereby revoke and rescind any power and authority heretofore executed by me, and declare that this authorization supersedes any other which I may previously have given to any person or organization to represent me for the purposes above set forth. This authorization shall remain in full force and effect from one year from date hereof."

Mr. Alvarado's limited two years of formal education as shown in his questionnaire would clearly substantiate that he had no understanding of what he was signing and that the contents of the cards was never carefully and correctly read and explained to him, and that he signed thinking he was signing for an election. The Trial Examiner's rulings prevented

Respondent from eliciting this testimony during direct examination (Tr. 176, 177). If this is considered with his testimony in which he evidenced a complete ignorance of what he was doing when he signed the card, his card should be disallowed. General Counsel failed to introduce evidence that Mr. Alvarado clearly understood what he was signing. The burden is on the General Counsel to prove the validity of the cards, and in this respect, the General Counsel failed.

Andres M. Leyva: Mr. Leyva testified that he was told there was going to be an election to vote for the Union, at the time he signed the card. Considering Mr. Layva's inability to speak and understand the English language, and his limited formal education, his card should be disallowed. General Counsel failed to introduce evidence showing Mr. Leyva clearly

understood what he was signing.

Narcisco G. Nunez: Mr. Nunez testifi that something was said about voting, and again considering his inability to speak and understand the English language, and his very limited education, his card shoul be disallowed. The General Counsel again failed to establish that the contents of the card were carefully and clearly explained to him, so that he clearly understood what he was signing.

Magadaleno M. Sanchez: Mr. Sanchez testified that he was told that the purpose of signing the card was just to have an election, and again considering his inability to speak and understand the English language and his very limited formal education, his card should clearly be disallowed. The General Counsel failed to establish that the contents of the card were carefully and clearly

explained to him, so that he clearly understood what he was signing.

David Walker: Mr. Walker stated in his questionnaire, which was marked for identification, in his answer to Question No. 7:

> "Were you ever told that if you would sign a Union authorization card that it would only be for the purpose of holding an election to determine whether or not the majority of the employees desired a Union?"
>
> (Underlined for emphasis)

Answer: "Yes".

The limited amount of examination allowed Respondent's counsel prohibited the proper refreshing of Mr. Walker's memory. It is Respondent's position that the questionnaire should have been allowed for the purpose of refreshing or impeaching Mr. Walker's testimony. If Walker's memory

was refreshed through the use of his questionnaire he would have substantiated the fact that he signed only for the purpose of obtaining and electio. In addition to Mr. Walker's card, the cards of the four Spanish speaking witnesses (three of whom were born in Mexico) should be disallowed, thereby giving the Union only eleven (11) cards out of Twenty-two (22) names on the list, and th unit may have been as high as twenty-four (24), or even more. The cards of all Spanish speaking employees should be disallowed because of Genera Counsel's failure to establish by substantial evidence that the cards' contents were clearly explained and that they understood what they were signing, and the purpose for which they were signing. It is accepted that cards generally speak for themselves, but the cards in this case should not speak for themselves for the reasons herein mentioned.

There are numerous cases which hold that authorization cards should be rejected if the

cards were signed to obtain an election and not to authorize Union representation. NLRB v. Winn-Dixie Stores, Inc., 341 F2d 750 (6th Cir. 1965); Englewood Lumber Company, 130 NLRB 394 (1961).

Cases which have decided that absence of real proof of fraud or deceit calls for a finding that employee knew what he was doing would not apply to the facts of this case, since an employee cannot know what he is doing unless he can understand the language. This is especially true of individuals who have never completed grade school or High School. The seven (7) questionnaires in Spanish, which were marked for identification, and the testimony of four (4) of the Spanish speaking employees, above mentioned, clearly establishes the fact that the General Counsel should have established by substantial evidence that the said employee had the card they signed carefully explained to them in Spanish, and that they understood the contents of said card. This was never done.

Spanish-American employees who have a limited education, as evidenced by their questionnaires, and do not understand English, should not be placed in the position of having to understand the difference between being told "signing the card will bring about an election" and "the card is only to get an election". The "only" or "sole purpose" doctrine recently endorsed by the Board in Cumberland Shoe Corp., 144 NLRB 1268, 1269 (1963), enforced 351 F2d 817 (6th Cir. 1965), should not apply to employees who cannot understand English and have very little formal education. How can such employees exercise a reasoned choice in the absence of a clear explanation and understanding of what they are doing?

Based on a total context of the facts in this case, the authorization cards of the Spanish speaking employees, and especially the four Spanish employees who testified, should be disallowed since the General Counsel did not prove by substantial evidence that the cards' contents and

impact were carefully explained in a language the employees understood. This should be the minimum requirement in factual situations such as this in order to allow a Union to detour around the secret ballot provision of Section 9(c) and thereby force recognition via authorization cards.

Respondent urges to the Court the necessity to protect employees who because of their place of birth or limited education would otherwise be highly vulnerable. The right of these individuals to avail themselves of our democratic secret ballot system should not be negated by the high pressured tactics sometimes used by labor organizations which tactics and the legal results thereof are too subtle and too complex for these unsuspecting employees to comprehend. Respondent urges the court, because of the background of the employees, to resolve all disputes in favor of the employees' right to a secret ballot election.

ARGUMENT

SPECIFICATION OF ERROR # 2

THE RECORD TAKEN AS A WHOLE DOES NOT E SUBSTANTIAL EVIDENCE SUPPORT THE BOARD'S FINDIN THAT THE MEETING WITH MR. WILLIAM HALLORAN WAS VALID CARD CHECK FOR THE PURPOSE OF RECOGNIZING THE UNION NOR THAT THE METHOD USED WAS A RELIAB METHOD OF RECOGNIZING A UNION, SUFFICIENT TO RE PLACE A SECRET BALLOT ELECTION AS PROVIDED IN SECTION 9(C) OF THE NATIONAL LABOR RELATIONS ACT.

The history of the National Labor Relation Act strongly suggests that the secret ballot wa intended to provide an exclusive procedure for selecting a bargaining representative. Before 1947, Section 9(c) of the National Labor Relations Act empowered the Board, in deciding the issue of representation, to "take a secret ballot of employees or utilize any other suitable method to ascertain such representation". National Labor Relations Act (Wagner Act) 49 Stat

53 (1953). The Taft-Hartley revisers, in rewriting Section 9(c), provided only for the secret ballot procedure for deciding the issue of representation. Despite this change in legislative history, the Board and the courts seem to have endorsed the pre-revision interpretation of Section 9(c) permitting a union to become the exclusive representative without a 9(c) election. It is a misinterpretation of Section 9(c) to allow card checks to replace a secret ballot election. Union Authorization Cards, 75 Yale Law Journal, P 820 et. seq. (1966)

When an election is not used, the substituted method should be reliable, and one which is agreed upon by the Union and the Employer, since the solicitation of authorization cards is virtually unregulated, unlike a secret ballot election, which is closely regulated. When authorization cards are used in place of secret ballot elections, the authorization cards should be accepted only if both parties agree to a card check,

and the card check is conducted by a reliable method which also establishes the validity of the cards. This is absolutely necessary in order to protect the employees themselves; otherwise, employees may have a union representing them which was never their intention when signing such cards. This is especially true when many employees cannot read, write, nor understand English. Solicitation of cards is frequently irregular, and statistics have shown their unreliability. See 1962 Proceedings Section of Labor Relations Law, American Bar Association 14-17; NLRB v. Johnnie's Poultry Co., 344 F2d 617, 620 (8th Cir. 1965).

The General Counsel is basing his case on Fred Snow & Sons v. NLRB, 308 F2d 687 (9th Cir. 1962), where the court said that the employer did not have a

genuine good faith doubt when he received reliable information of Union representation through a card check conducted by a clergyman selected by both the employer and the Union. The card check was conducted by the clergyman by comparing signatures on the cards with signatures on W-2 Income Tax Forms furnished by the employer. This was a reasonably reliable method under the circumstances, in that the employer joined in the selection of the clergyman and signatures were compared. In Snow & Sons, supra, the court found that the employer's objective in seeking delay and its rejection of the collective bargaining concept was manifest when the employer repudiated the previously agreed upon card check.

The Board, in John P. Serpa, supra, held that the mere fact that the Union

placed cards in front of the employer in such a way that employer probably saw the names and signatures could not create an obligation to bargain or establish the employer's bad faith. The Board, in John P. Serpa, supra, distinguished Snow & Sons, supra, in a footnote when it said:

> "This is clearly distinguished from Snow & Sons, 134 NLRB 709, where the employer agreed to the check of cards against the payroll by a neutral third party and thereafter rejected the result of such a check and sought a Board election."

Snow & Sons, supra, was again distinguished in NLRB v. Porter County Farm Bureau Co-operative Association, 314 F2d 133 (7th Cir. 1963). The court distinguished the Snow case, supra, saying that the reason for the Snow holding was:

> "That a clergyman selected by management representatives as a neutral person to examine the signatures informed them in writing that the cards were applications for Union membership."
>
> (emphasis supplied)

In the case at bar, Respondent never did receive information as to what the cards contained. In fact, during every meeting held with the Union, the Union representative informed Respondent that it couldn't see the cards nor know the contents. Thus, there was no way Respondent could make any challenges. In Porter, supra, Union and management had previously met to discuss matters of general interest. So, the mere fact that Respondent met with the Union to discuss preliminary matters should not be a basis of inferring that the Respondent desired to recognize the Union without it first establishing its majority at an election or by some other reliable method.

Mr. Halloran was selected by the Union without any knowledge or consent of Respondent (Tr. 22, 51, 52, 204, 205). Respondent had no idea that the Union wanted

to inform Respondent of the number of employees it felt it represented in this manner until the April 14th meeting, at which time Respondent went along, relying on the fact that there was an agreement with the Union that reserved to Respondent the right to petition for a secret ballot election if the preliminary discussions failed.

There was no evidence introduced to show that Respondent had rejected the collective bargaining principle. To say that what occurred at the meeting with Mr. Halloran was a card check is implausible in the context of the facts of this case. This case is clearly distinguishable from Snow & Sons, supra. The Union's purpose was to avoid a card check which would be agreeable to both parties, by alleging that the meeting with Mr. Halloran was in fact a card check mutually agreed upon by the

parties, thus imposing and forcing the Union upon the employees without their right to a secret ballot election.

IT IS RESPONDENT'S CONTENTION AS ESTABLISHED BY THE TOTAL CONTEXT OF THE FACTS IN THIS CASE THAT WHAT OCCURRED IN MR. HALLORAN'S OFFICE WAS NOT A CARD CHECK TO CONSTITUTE A SUBSTITUTE FOR THE SECTION 9(c) ELECTION PROCEDURE, AND THAT THE MERE NOTIFICATION BY MR. HALLORAN THAT THE UNION HAD FIFTEEN SIGNED CARDS, BY MERELY COMPARING THEM TO A TYPEWRITTEN LIST OF NAMES (TR 24), WITHOUT INFORMING THE RESPONDENT OF THE CARDS' CONTENTS, OR COMPARING SIGNATURES, AND NOT INQUIRING INTO THE CIRCUMSTANCES AS TO HOW THE CARDS WERE ACQUIRED, IS AN ABSOLUTELY UNRELIABLE METHOD OF INFORMING RESPONDENT OF THE UNION'S MAJORITY. IN ADDITION, MR. HALLORAN ADMITS THAT HE

DID NOT EVEN READ THE CARDS (TR 24).

In the Yale Law Journal article, supra, on page 818, the following was said:

> "Authorization cards are an unreliable index of employee choice. Compared with the secret ballot they replace, their solicitation is a woefully defective process, guaranteeing the employees neither a fair nor a reasoned choice. Their admitted inferiority to a properly conducted secret ballot should preclude their use absolutely when the employer has not committed an unfair practice interfering with employee free choice."

Thus, when a card check is to be a substitute for a secret ballot election, it should be conducted in such a way as to assure that the employees' choice is to have a union represent them.

The card check in our case was not conducted in this manner, because the Respondent had never intended Mr. Halloran's count to constitute a card count for the determination of the Union's majority.

Based on the history of Section 9(c) of the National Labor Relations Act, this Respondent should not be bound to recognize the Union under the circumstances of this case, since this was not a card check for the purpose of recognizing the Union, and it was further a most unreliable method of informing Respondent of Union's majority.

SPECIFICATION OF ERROR # 3

THE TRIAL EXAMINER ERRED IN LIMITING THE CROSS EXAMINATION OF MR. BENNINGER THEREBY PREVENTING RESPONDENT FROM ASCERTAINING THE VALIDITY OR INVALIDITY OF THE UNION AUTHORIZATION CARDS (TR 133).

The Trial Examiner ruled that Respondent by agreeing to a card check (which is an issue in controversy) waived all right to attack the validity of the

authorization cards except the question of whether or not the signature is the actual signature of the employee purporting to sing the card. This position of the Trial Examiner, Respondent respectfully alleges, is in error. Especially in the case of non-English speaking employees, is the intent of the party signing the card important. NORLEE TOGS, INC. (1960) 129 NLRB 14. There are many circumstances under which a card can be invalid. Coopers, Inc. (of Georgia) (1954) 107 NLRB 979. Flint River Mills, Inc. (1953) 107 NLRB 472. Brezner Tanning Co., Inc. (1943) 50 NLRB 894, 141 F2d 62; NLRB vs. Thompson, Inc. (2 Cir. 1953) 208 F2d 743. These cases all state that if the Union doesn't have a majority, without counting invalid designations, the employer cannot recognize the Union as the bargaining

agent of the employees.

The Trial Examiner, by preventing Respondent from inquiring into the matter of the validity or invalidity of the authorization cards, deprived the employees and the employer of valuable rights granted to them under the National Labor Relations Act.

SPECIFICATION OF ERROR # 4

THE TRIAL EXAMINER ERRED BY STRIKING, AS IMMATERIAL, THE ANSWER OF MR. HALLORAN TO THE FOLLOWING QUESTION: "HAD YOU AT ANY TIME PRIOR TO LOOKING AT THE SIGNATURES ON THE CARDS TO THE BEST OF YOUR KNOWLEDGE SEEN THE SIGNATURES OF ANY OF THOSE INDIVIDUALS?" (TR 30).

Examining the record as a whole it is evident that the purported card check was not conducted under such circumstances as would be deemed adequate to give validity

to the card check sufficient to prevent the employees from exercising their right to a secret ballot election.

The cards allegedly checked by Mr. Halloran were matched against a typewritten list of names (Tr. 24). Mr. Halloran admitted that he did not read all of the cards and may have read one or two only (Tr. 24). The employer had nothing to do with picking Mr. Halloran nor did the employer Respondent know Mr. Halloran at all, while at the same time Mr. Halloran was known by the members of the Union (Tr. 22,). In addition, the Trial Examiner ruled that Respondent could not inquire as to whether or not the signatures on the cards were written or printed since the answer would be immaterial. Mr. Pavilack asked Mr. Halloran on cross examina-

tion:

> "Do you remember if any of the names were printed on the cards or if they were all written signatures, Sir?" (Tr. 29)

An objection was made and improperly sustained (Tr. 30). Respondent excepted to the ruling (Tr. 30). Respondent respectfully maintains the signature of the party purporting to sign the card is of fundamental importance.

SPECIFICATION OF ERROR # 5

THE TRIAL EXAMINER ERRED IN DENYING RESPONDENT THE RIGHT TO USE QUESTIONNAIRES OF THE EMPLOYEES FOR PURPOSES OF IMPEACHING THE AUTHORIZATION CARDS ADMITTED INTO EVIDENCE AND FURTHER ERRED IN DENYING RESPONDENT THE RIGHT TO USE THE QUESTIONNAIRES TO REFRESH THE MEMORY OF WITNESSES,

ALL OF WHOM WERE EMPLOYEES OF RESPONDENT (REJECTED EXHIBITS 2 THROUGH 16; TR. 151, 152, 166).

The testimony of Mr. Allen and Mr. Benninger was credited by the Trial Examiner and was of primary importance in the case being presented by the NLRB. The Trial Examiner's refusal to allow documents impeaching the testimony of the witnesses called on direct examination by the NLRB prevented Respondent from utilizing one of the basic tools permitted by our adversary proceedings, namely; the right of cross examination and the right to impeach witnesses. The argument of respondent in support of Respondent's Specification of Error # 1, is hereby adopted in further support of the argument in support of Specification of Error # 5.

SPECIFICATION OF ERROR # 6

THE TRIAL EXAMINER ERRED IN STRIKING THE TESTIMONY OF MR. ALVARADO, WHOSE TESTIMONY WAS MATERIAL AND HIGHLY IMPORTANT TO RESPONDENT'S PROOF OF THE INVALIDITY OF THE UNION AUTHORIZATION CARDS (TR 176).

The direct examination of Mr. Alvarado by Mr. Pavilack was as follows:

Question: "Please state your name and address for the record."

Answer: "Conception Alvarado, 2410 South 18th Street, Phoenix."

Question: "Do you read English?"

Answer: "No."

Question: "Do you read Spanish?"

Answer: "No."

Question: "Do you write English?"

Answer: "No."

Question: "Do you write Spanish?"

Trial Examiner: "All right, now, all of that testimony may be striken."

Striking of this testimony by Trial Examiner was in furtherence of his improper rulings that no testimony could be taken or elicited showing or tending to prove the invalidity of the cards unless the testimony dealt only with the genuiness of the signature or any statement made to the employee that the card would be used only for the purpose of having an election. As argued in support of Specification of Error # 1, this ruling by the Trial Examiner is in error and resulted in prejudice against Respondent.

SPECIFICATION OF ERROR # 7

THE TRIAL EXAMINER ERRED IN RULING THAT RESPONDENT COULD NOT ASK OF THE

WITNESS MR. LEYVA IF THE UNION CARD WAS READ TO HIM (TR 173).

It is significant to note that the Spanish interpreter was required during the taking of the testimony of Mr. Leyva (Tr. 168, 169). It is also significant that the Union authorization cards were written in English (National Labor Relations Board Brief Page 10). It is also significant that the questionnaire of Mr. Leyva, as contained in the Rejected Exhibit File, contains the following questions and answers in Spanish:

C U E S T I O N A R I O

1. Cuanta escuela tiene usted? (4-Años)*
2. Donde nacio usted? (-En Mexico)*
3. Habla usted Ingles? (-No)*
4. Comprende Ingles usted? (Si)*
5. Cual is la idioma principal que habla usted? (Español)*

6. Ha oido rumores usted que la planta C and C Packing Company se va a cerrar si los empleados no se enlazan con la union? (No)*

   A. Si su respuesta es "Si", como se informo de este rumor?

7. Fue usted informado que si daba su firma a la tarjeta de authorizacion de union seria solamente para una eleccion para determinar si la majoria de empleados desean la union? (Si)*

   A. Si su respuesta es "Si", quien le dijo? (El representante de la union)*

8. Fue usted amenazado o forzado en cualquier modo para que firmara la tarjeta de union? (No)*

   A. Si su respuesta es "Si", quien y como lo forzo o lo amenazo?

9. Comprende lo siquiente? (No)*

   "I hereby authorize the AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, to represent me and bargain collectively with my employer in my behalf, to negotiate and conclude all agreements concerning wages, hours, and all other conditions of employment.

   "I hereby revoke and rescind any power and authority heretofore executed by

* Parts of the questionnaire in parentheses indicate handwritten answers by Mr. Leyva

me, and declare that this authorization supersedes any other which I may previously have given to any person or organization to represent me for the purpose above set forth. This authorization shall remain in full force and effect for one year from date hereof."

Su Firma Andres Leyva

Fecha 8-22-66

In view of Mr. Leyva's having been born in Mexico his inability to read, write, or understand English, and the statement in his questionnaire that the Union authorization card was signed only for the purpose of having an election and that this was stated to him it appears extremely significant and important that Respondent be permitted to ask the question, "Was the Union authorization card read to you by the Union representative?" Certainly, under the circumstances which are present

in the case of Mr. Leyva the validity of the Union authorization card is an extremely important matter to be resolved and its validity is highly questionable. Respondent should have the opportunity to elicit testimony concerning this matter. By this ruling of the Trial Examiner, Respondent was prevented from asking the same or similar questions of the other employees. NLRB v. S. E. Nichols Co., (USCA-2 6-21-67). Engineers & Fabricators, Inc. v. NLRB (5th Cir. 4-12-67). Bauer Welding & Metal Fabricators, Inc. v. NLRB (8th Cir. 1966) 358 F(2d) 766. NLRB v. Swan Super Cleaners, Inc. (10-25-67).

SPECIFICATION OF ERROR # 8

THE TRIAL EXAMINER ERRED IN FINDING

AS A FACT THAT THE EMPLOYEES KNEW FULL WELL THE MEANING OF THE AUTHORIZATION CARDS THEY SIGNED (TRIAL EXAMINER'S DECISION PAGE 5).

Nowhere in the record did General Counsel for the NLRB establish by substantial evidence that the majority of the employees understood the meaning of their cards. Allen could not speak or understand Spanish (Tr. 83). Allen didn't understand what Mr. Garcia told the employees and whatever Garcia told Allen is pure hearsay. Mr. Benninger testified that he understood very little of what Mr. Garcia said, if any, and could not understand the answers which were in Spanish (Tr 142). Mr. Garcia was not a witness and therefore, the Trial Examiner is basing his conclusion on the hearsay testimony of Allen and Benninger as to

what was related to them by Mr. Garcia. This is not substantial evidence to support the Examiner's conclusion, especially in view of the Trial Examiner's position that Respondent was not permitted to question any of the employees concerning this question of whether or not they understood the meaning of the authorization cards they signed (Tr. 116, 117, 133, 151, 152, 167, 172, 173, 175, 176, 179, 186). Respondent's Rejected Exhibits 1 through 16 contained in the Rejected Exhibit File, indicate unequivically that a significant number of the employees stated they did not understand the meaning of the statement contained on the Union authorization card. Unfortunately, the Trial Examiner saw fit to prevent and prohibit Respondent from introducing any direct testimony from the employees

substantiating what they stated in their questionnaire. In view of these circumstances, the conclusion of the Trial Examiner can hardly be said to have been supported by substantial evidence.

SPECIFICATION OF ERROR # 9

THE NLRB FAILED TO PROVE BY SUBSTANTIAL EVIDENCE THAT RESPONDENT DID NOT HAVE A GOOD FAITH DOUBT OF THE UNION'S MAJORITY.

One of the elements to be considered in determining whether an employer must recognize a union without an election is whether or not he had a genuine good faith doubt of the Union's majority, assuming, of course, that the union does in fact represent a majority of the employees. (This fact is in question in the case at bar) See John P. Serpa, supra.

Practically every case except Snow & Sons, supra, involved not merely an unfair labor charge under Section 8(a)(5), but additional unfair labor charges under Section 8(a) of the National Labor Relations Act on the part of the employer.

In the case at bar, the only charge against the Respondent is refusing to bargain, because Respondent allegedly received reliable information that the Union represented the majority of the employees. General Counsel has never alleged anything to the contrary and not one iota of evidence of any other alleged unfair labor practice has been alleged by the General Counsel.

The recent test enunciated by the Board regarding the proof of good faith doubt was in Aaron Brothers Company of California, 158 NLRB No. 108 (1966), where the Board said:

> "Absent an affirmative showing of bad faith, an employer, presented with a majority card showing and a bargaining request, will not be held to have violated his bargaining obligation under the law simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority."
>
> (Emphasis supplied)

In Snow & Sons, supra, the court stated that if the card check indicated a majority of signatures, that the employer must have known that the union in fact had a majority. But in Snow & Sons, supra, the clergyman was selected by both the union and the employer; the clergyman informed the employer that the cards were applications for union membership, and the clergyman compared such signatures with signatures on W-2 Income Tax Forms.

This did not occur in the case at bar, and as previously discussed herein, Respondent could not in good faith rely on what

Mr. Halloran did, since he merely looked at the cards and compared names with a typewritten list, did not read the cards, and no inspection of cards was allowed. Respondent did not know the contents of the cards, or whether the signatures were the actual employees' signatures. In fact, Mr. Halloran did not know this, since he had no signatures to compare. Further, Mr. Halloran was selected without Respondent's approval or knowledge.

Therefore, Respondent's position in refusing to bargain because of the so-called card check cannot in itself constitute a showing of bad faith.

All other actions on the part of Respondent are consistent with its good faith doubt of the Union's majority.

The Respondent was willing to have a consent election. Respondent further

agreed to enter into preliminary discussions without an election, for the purpose of saving time, to determine what employees' grievances would be discussed, and to agree on a reliable method by which Respondent would recognize the Union, if the Union in fact represented the majority of the employees. The Respondent during every meeting with the Union, informed the Union representatives that it doubted that the Union actually represented the majority of its employees.

Respondent realized that when the Union said it felt it represented fifteen men, that this was impossible because of matters known by Respondent. For this reason, the Respondent requested the Union to establish its majority by an election. Respondent attempted to show its good faith doubt of Union's majority, but was prevented from

so doing by the erroneous rulings of the Trial Examiner (Tr. 294).

How can it be said Respondent's actions were inconsistent with its good faith doubt in the context of the above occurrences?

The consent election was originally set for April 27, 1966. Respondent informed the Union that they should go ahead with the election as previously agreed to by letter dated April 18, 1966. Respondent further filed a petition for an election on April 25, 1966. The election could have been arranged with very few days lost from the date originally set for the election.

So this is again unlike Snow & Sons, supra, where the employer refused to go ahead after the clergyman conducted a card check. The time lapse from the date of the original election would have been diminimus,

and would not have prejudiced the Union in any way, especially in light of Respondent's continued showing that it had no anti-union animus.

The Respondent was not trying to gain time to undermine the Union. In fact, the Respondent has been meticulous in its actions to avoid any implications that it is undermining the Union. There was not one iota of evidence introduced to show any undermining, or that Respondent was trying to gain time to accomplish an undermining of the Union.

The Respondent has no prior history of anti-union animus, and from the testimony introduced, it clearly established that the Respondent would bargain with the Union if this was what the employees wanted. The Respondent's only contention is that it in good faith does not believe the majority of its employees want the

Union, and that most of the employees who signed the cards signed only for the purpose of holding an election, or they did not know what they were signing. The evidence fails to show the Respondent had intimidated or coerced any of its employees into restaining from signing with the Union.

When the total picture is considered, there can be no other conclusion but that General Counsel has failed to prove by substantial evidence that Respondent did not have a good faith doubt of the Union's majority.

The test for substantial evidence means such relevant evidence as a reasonable mind might accept. Universal Camera Corp., v. NLRB, 340 U. S. 474 (1950).

It is Respondent's position that the General Counsel has failed to establish a prima facie case by substantial evidence affirmatively showing that Respondent

acted in bad faith under the Aaron Brothers test, supra.

SPECIFICATION OF ERROR # 10

THE TRIAL EXAMINER'S STATEMENTS AND ACTIONS DURING THE HEARING CONVEYED THE APPEARANCE OF A PARTISAN TRIBUNAL ALL TO THE DETRIMENT AND PREJUDICE OF RESPONDENT.

The Trial Examiner hearing this matter, before the end of the first morning of hearing and before even the second witness had completed his testimony, and before Respondent had an opportunity to present its case, had apparently already decided certain matters that were in controversy and were clearly of material significance in importance. The Trial Examiner stated:

> "but, the fundamental thing here, there was an agreement to a card check and the petition was withdrawn prior to that, Sir there is no question about that. The rest of this is beside the point." (Tr 92)

This question of whether or not there was an agreement to a card check was one of the fundamental questions to be resolved by the hearing officer. Apparently, this was decided before full evaluation of all evidence.

When Mr. Pavilack challenged the validity of the cards by questioning the intent of the parties when signing the cards (Tr. 113) the Trial Examiner made the following comment:

> "The defense here seems certainly to approach the frivilous to me."
>
> "Now, there may be, it may be that you will be able to produce one or two witnesses that will come in here and say, 'Well, we really didn't understand what we were signing', or something to that effect."
>
> "But, in view of the course of events, I would regard that, I will advise you right now, as having very little weight, if any, if that is going to be your proposed defense."

Again it is obvious that this partisan tribunal had decided even prior to the completion of petitioners case that there was no

question as to the validity of the Union authorization cards, thereby, completely making it virtually impossible for Respondent to present his case with the knowledge that it would receive fair consideration and evaluation.

The Trial Examiner continued shortly thereafter by making a statement to the effect that even if the cards were admittedly signed under false representation, that it would not invalidate the cards or would not be sufficient to dispute the majority (Tr. 116, 117). It is Respondent's position that if the Union, in fact, did not represent a majority of the employees Respondent could not be found guilty of refusing to bargain with the Union or of refusing to recognize the Union. When this issue was presented to the Trial Examiner his reply was:

> "Well, maybe we will get to that point, and maybe we will not" (Tr. 117).

The Trial Examiner did throughout the hearing, as has been indicated throughout this brief, make rulings which resulted in Respondent's being prevented from presenting its case or from attempting to show the invalidity of the cards. Had Respondent had the opportunity to show that the obtaining of the signatures cards was by such means and methods as to render them invalid, the result might well have been that the Union at no time validly represented the majority of the employees.

This appearance of a partisan tribunal is further evident by an examination of the Trial Examiner's DECISION. A number of matters are contained under the heading "undisputed facts" which without question were disputed from the conception and are still in dispute. To Wit:

> "Then Pavilack asked the Union representatives if they would be willing to withdraw the petition for an election if a majority could be proved." (Trial Examiner's DECISION, Page 2)

This statement was in dispute at the time of the hearing and has never been resolved (Tr. 197, 271, 278).

Trial Examiner further stated:

> "Upon being apprised of this development Deeny requested the petition to be withdrawn, apparently to meet the demands of Internal Board Administrative requirements." (Trial Examiner's DECISION Page 2).
>
> (Emphasis supplied)

The underlined portion of the so-called undisputed fact was never brought out by the evidence, therefore it cannot under any circumstances be considered an undisputed fact.

Trial Examiner further stated:

> "One or two days before the start of this hearing, Respondent called its employees in groups of five and interrogated them with respect to the Union authorization cards. It also required them to sign statements concerning the circumstances surrounding the signing of the cards." (Trial Examiner's DECISION Page 5)

There is absolutely no evidence in the record to show that the employees were required to sign statements. In fact, the contrary is evidenced since several of the questionnaires in the Rejected Exhibit File are unsigned. The Examiner's conclusion is mere speculation unsupported by substantial evidence or in fact any evidence all of which gives the appearance of a partisan tribunal.

The specific and cumulative effect of the hearing officer's statements and rulings renders the appearance of a partisan tribunal.

CONCLUSION

The National Labor Relations Act attaches great significance to a choice of the majority of employees. The Union elected by majority acts as the "exclusive representative" of all employees. See Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harvard Law Review 389, 396 (1950). It becomes extremely important, therefore, that the problem confronting the court be determined so as to give the proper intent and construction to the Act. The designation of a Union by cards rests upon a strained reading of the National Labor Relations Act. And beyond the question of interpretation, the Board has failed to evaluate fairly the card procedure with reference to important policy consideration. Note Union Authorization Cards, 75 Yale Law Journal 806.

The use of authorization cards as a substitute for a secret ballot election arises primarily from the construction of remedies of an unfair labor practice committed by an employer. It must be noted that the Act authorizes the Board to protect employee free choice not to penalize the employer. Note Union Authorization Cards, 75 Yale Law Journal 818. The author of the article in the Yale Law Journal continued with the following statement:

> "Authorization cards are an unreliable index of employee choice. Compared with the secret ballot, their solicitation is a woefully defective process guaranteeing the employees neither a free nor a reasoned choice. Their admitted inferiority to a properly conducted secret ballot should preclude their use absolutely when the employer has not committed an unfair practice interfering with employee free choice."

In the case at bar there is not one iota of

evidence indicating any unfair practice by the employer interfering with employee free choice. If the real issue is the devising of remedies to protect employee free choice it is particularly difficult to justify depriving both employees and employers of an election when there has been neither unfair labor practices nor an election campaign.

Even with the scanty bit of testimony permitted to be elicited from the employees by virtue of rulings of the Trial Examiner, which appear to consistently favor the Union, it becomes evident that a substantial number of Respondent's employees are non-English speaking, reading, or understanding individuals who have limited education. Their right to a secret ballot election should be carefully guarded by the courts for the reasons cited in this

brief. Respondent respectfully prays that this honorable court deny the petition for enforcement of the order of the National Labor Relations Board.

RAWLINS, ELLIS, BURRUS & KIEWIT

By _____
PETER KIEWIT, JR.

By _____
LAWRENCE L. PAVILACK

May, 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

_____
LAWRENCE L. PAVILACK
Attorney for Respondent